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THE DEFENSE CANNOT REST:
THE IMPACT OF THE LEVEL OF FUNDING FOR INDIGENT DEFENSE
SERVICES ON INCARCERATION RATES

By Tolly Colby

An Independent Study Thesis
submitted to the Department of Political Science
at The College of Wooster
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Adviser: Sid Simpson

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Abstract:

Since the landmark decision of *Gideon vs Wainwright* in the Supreme Court in 1963, free legal counsel for indigent clients has been required for every state in the United States. However, the reality looks very different than this ideal with indigent defense services across the country being under-resourced, under-funded and forgotten by many other than those that require their services. This is happening in conjunction with the explosion of incarceration rates throughout the United States. This study aims to explain the relationship between the levels of funding provided for indigent defense services and the rates of incarceration. Using a multi-variate regression my study tests the per-capita funding for indigent defense services compared to the incarceration rates for 49 states and every county in Pennsylvania. This study found for half of the results that a higher level of funding for indigent defense services does lead to a lower incarceration rate.

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Chapter 1: Introduction

“You have the right to an attorney, if you cannot afford an attorney one will be appointed to you.” – Miranda rights (also every television show ever)

These words are etched into the mind of almost every television watching American citizen. We hear them so often that it becomes easy to internalize these words as true and walk through life assuming that this right to legal counsel is ensured equally to all criminal defendants. However, the reality of funding and access to free and effective legal counsel can be very different. In a report on indigent defense services, *Last Week Tonight with John Oliver* rewrote this section of the Miranda Rights to say

“You have the right to an attorney, if you cannot afford an attorney one will be provided for you ... that attorney may have 300 other cases that he or she is working on, that’s not a joke, literally 300 other cases. They could potentially have a total of seven minutes to prepare your defense ... That attorney may be exhausted not able to think straight, that attorney is likely to be grossly underpaid or working in an office crawling with cockroaches ... that attorney may pressure you to take a guilty plea. Statistically ... there’s a 90 plus percent chance that you will take that guilty plea ... and one other thing, that attorney that was provided for you may not be free. If you lose you may have to pay ‘em, you might even have to pay the prosecutor.”¹

Oliver’s reporting represents the reality of indigent defense in our criminal justice system and serves as a call to examine what we see as true in this system with regards to the availability of adequate legal services for indigent clients and the long-term impact it

¹ Oliver, *Public Defenders*.

has on communities in terms of the future of crime and incarceration. The goal from the 1963 Supreme Court in the case of *Gideon vs Wainwright* in mandating the availability of legal counsel was to ensure that every client no matter their financial situation has the ability to mount an effective defense against the prosecutors that charge them. Indigent defense services are the (supposedly) free legal services provided to criminal defendants who are unable to afford private legal counsel.

There are countless stories of indigent defense attorneys not being able to meet the demands and expectations of their clients and caseloads. One of the best examples of this is the story of Crystal Weimer, a mother to three girls, who was accused of a crime she did not commit in Fayette County, Pennsylvania.² Weimer could not afford the 50,000 dollars it would cost to mount her defense and therefore turned to what she saw as the best option for her, the Fayette County Office of the Public Defender.³ Weimer, knowing that she was innocent, originally stated that she was not concerned about the outcome of her case but quickly realized that the patchwork system of indigent defense in Pennsylvania would let her down.⁴ After she was arrested for a second time after having the charges dropped the first, she faced 30 years in prison for third-degree murder.⁵ The prosecution in her case offered her a plea deal which a representative from the public defender's office pushed her to accept.⁶ She refused to do so however, stating that she would not admit to doing something she hadn't done.⁷ This refusal to accept a plea

² Preveti and Lazarski, "Wrongful Murder Conviction Points to Systemic Problems with Public Defense in Pennsylvania."

³ Preveti and Lazarski.

⁴ Preveti and Lazarski.

⁵ Preveti and Lazarski.

⁶ Preveti and Lazarski.

⁷ Preveti and Lazarski.

pushed Weimer to take her case to trial, and leaving her fate in the hands of a public defender who on average had two fewer months than their private counsel counterparts to prepare for similar cases.⁸

Weimer then spent two years in jail awaiting trial.⁹ Despite all of this she continued to be hopeful about the outcome of her case, believing that because she was innocent, the jury would rule so.¹⁰ Weimer was sentenced to 12-25 years in prison for this crime that she did not commit.¹¹ Her attorney was not surprised at this outcome stating, “I’m not going to beat myself up for this. I’ve been beating myself up for 33 years on this, it’s not going to change until the state takes over the system — which I don’t see them ever doing – it’s not going to be a fair fight.”¹² This dejection is something that indigent defense attorneys across the country feel, that no matter the hours and effort they put in, they are so unevenly matched that, in many cases, it is difficult to see a world in which an indigent defendant is actually heard in criminal cases.¹³

Upwards of 80% of criminal defendants in the United States could be considered indigent.¹⁴ This statistic points to many of the problems that we see in the United States Criminal justice system. Such a dramatic number of people needing these services should imply that we would fund and pay more attention and respect to the people that take on this work. However, these services are often the first on budget chopping blocks and the last thing we consider when talking about criminal justice reform and prison

⁸ Preveti and Lazarski.

⁹ Preveti and Lazarski.

¹⁰ Preveti and Lazarski.

¹¹ Preveti and Lazarski.

¹² Preveti and Lazarski.

¹³ Pfaff, Personal conversation.

¹⁴ Pfaff, *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform*.

abolition. Considering the fact that the United States has the largest prison population in the world, and these services are in such high demand for those accused of crimes, it ought to be impossible to attempt to reduce our incarcerated population without also talking about indigent defense services.¹⁵

This study aims to examine the relationship between the levels of funding for indigent defense services and the levels of incarceration in those communities that they represent. I hypothesize that the higher the funding for indigent defense services, the lower the rate of incarceration. I base this hypothesis on the idea that higher funding for indigent defense leads to these services having more access to more attorneys, investigators, and social workers. This allows for indigent legal representation to be better opponent to prosecutors which could cause lower incarceration rates as it creates shorter sentences as well as fewer wrongful convictions.

In order to test this hypothesis I ran a multivariate regression testing the relationship between the per capita funding for indigent defense services and the incarcerated population from cases across the country. This study will be divided into five chapters, the first being this introduction. In Chapter two I will analyze and summarize the relevant literature surrounding indigent defense services and incarceration. Chapter three is an overview of my methodology and variables used. In Chapter four, I outline my results and discuss the implications. Finally, Chapter five summarizes conclusions from this study and makes suggestions for future research.

¹⁵ Pfaff.

Chapter 2: Literature Review

This chapter will address the state of the current literature regarding the question of how the level of funding for indigent defense services affects the rates of incarceration in those same communities. I will begin with an overview of the literature on indigent defense services and the current state of those services as they exist in real time. I will then move to the state of the literature on mass incarceration. I will end with a discussion of the brief literature on the two variables together and the gaps that exist in the literature as a whole.

Funding for Indigent Defense Services

The right of the criminally accused to a defense attorney in a criminal proceeding is and has been ensured since the sixth amendment was added to the constitution.¹⁶ However, this right did not extend to court appointed lawyers for the poor in every criminal case until the landmark supreme court case of *Gideon vs Wainwright* in 1963.¹⁷ Before *Gideon* the only case considering criminal defense for indigent clients was *Powell vs Alabama* in 1932.¹⁸ *Powell* was a case in which nine Black men were accused of raping two White women on a train.¹⁹ These men, described as “young, ignorant, and illiterate” could not afford an attorney for their defense and were sentenced to death in an Alabama court.²⁰ At the time, Alabama law required appointed counsel for capital cases but the attorneys in the case did not meet with their clients before the trial and for the

¹⁶ Justia, “The Right to a Public Defender Overview : Justia.”

¹⁷ Justia.

¹⁸ Sutherland, “Powell v. Alabama, 287 U.S. 45 (1932).”

¹⁹ Sutherland.

²⁰ Sutherland.

most part, merely appeared in court as opposed to mounting an effective defense.²¹ The question in this case was to discern whether the legal representation was unconstitutional with regards to the Due Process Clause, which ensures the fair trial for all citizens in the Fourteenth Amendment.²² The court ruled with the petitioner finding, that when a client as was the case for the defendants is unable to mount their own defense it is the duty of the government to provide an effective defense for those defendants.²³

This question was then left silent in the courts until *Gideon* was argued in 1963.²⁴ In this case, Clarence Earl Gideon was charged in Florida state court with felony breaking and entering.²⁵ Upon arriving to court without an attorney Gideon requested that the court provide one for him.²⁶ However, Florida law only provided attorneys to defendants in capital cases and Gideon was found guilty and sentenced to five years in prison.²⁷ Gideon filed a *habeas corpus* petition stating that the lack of an attorney violated his constitutional right to an attorney.²⁸ The outcome of this case ruled that the assistance of counsel is imperative in order for a defendant to have a fair trial which resulted in the conclusion that, in all criminal proceedings if the defendant could not afford an attorney they would be provided one by the government, becoming an important section of the Miranda rights listed to all people when arrested.²⁹ Since *Gideon*, all states have been required to ensure the availability of some kind of legal

²¹ Sutherland.

²² Sutherland.

²³ Sutherland.

²⁴ Black, "Gideon v. Wainwright, 372 U.S. 335 (1963)."

²⁵ Black.

²⁶ Black.

²⁷ Black.

²⁸ Black.

²⁹ Justia, "The Right to a Public Defender Overview :: Justia."

counsel for the poor.³⁰ However, with no central federal regulations or standards, the system for providing these legal services varies dramatically across states and can often fall short of what is necessary.³¹

Where states stand currently

After the Supreme Court mandated that legal services be provided for indigent clients, states were left to create their own systems leading to a patchwork system across the United States that is often inadequate in representing clients. There are four delivery systems (sometimes referred to as implementation systems) for indigent legal services across the United States: staffed public defenders, contract attorneys, assigned counsel, and mixed or county based systems.³²

Staffed public defenders are public employees whose job consists solely of representing indigent clients.³³ Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Kentucky, Maryland, New Hampshire, New Jersey, New Mexico, North Dakota, Rhode Island, Vermont, Wisconsin, Wyoming all use a staffed public defender system.³⁴ A study commissioned by the National Institute of Justice found that staffed public defense attorneys tended to have marginally lower conviction rates than contracted or assigned attorneys for certain homicide cases.³⁵ The authors hypothesize that because public defenders work with prosecutors much closer and much

³⁰ Justia.

³¹ Justia.

³² BJS, "Bureau of Justice Statistics (BJS) - Indigent Defense Systems"; Gideon at 50, "Gideon at 50 - 50th Anniversary of Gideon vs. Wainwright."

³³ Pfaff, Personal conversation.

³⁴ Gideon at 50, "Gideon at 50 - 50th Anniversary of Gideon vs. Wainwright."

³⁵ Anderson and Heaton, "Measuring the Effect of Defense Counsel on Homicide Case Outcomes."

more often than the attorneys from the other implementation systems they develop a better relationship than private attorneys and are able to yield a more favorable outcome due to their knowledge of prosecutorial styles.³⁶ The makeup of these offices can vary dramatically based on the funding that is allocated to them.³⁷ For example, the Office of the Public Defender in Rockville, Maryland hosted attorneys, social workers, assistants, and immigration specialists. However, this funding is distributed very unevenly between the counties.³⁸ The office in Rockville was able to afford all of the personnel listed above, but smaller, more rural areas see a disturbing lack of funding and personnel which forces them to adopt increasingly high caseloads and decreased services to their clients.³⁹

Contract attorneys are private attorneys who work with states or county governments on a contractual basis to represent a certain number of indigent clients.⁴⁰ Additionally, these attorneys generally carry a full caseload of private clients in addition to their indigent ones.⁴¹ The only state that uses a fully contract attorney system is Oregon.⁴² Studies on contract attorneys have yielded mixed results but the main consensus is that the attorneys sustaining a full practice can lead to less favorable results on trial outcomes (i.e. a higher conviction rate).⁴³ A study on indigent defense systems found that “contract attorneys often maintain a private practice in addition to their assigned clients, which can lead to excessive caseloads and may favor paying clients, potentially resulting in less quality representation for those requiring public defense

³⁶ Anderson and Heaton.

³⁷ Owens et al., “Indigent Defense Services in the United States, FY 2008–2012 – Updated.”

³⁸ Capital News Service, “Public Defenders Bear Uneven Burden.”

³⁹ Capital News Service.

⁴⁰ Pfaff, *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform*.

⁴¹ Pfaff, Personal conversation.

⁴² Gideon at 50, “Gideon at 50 - 50th Anniversary of Gideon vs. Wainwright.”

⁴³ Taylor, “System Overload: The Costs of Under- Resourcing Public Defense.”

services.”⁴⁴ This inability to ensure a parity in the quality of representation between paying and indigent clients poses a large problem to contract attorney implementation system.

Assigned counsel systems generally consist of private attorneys being appointed by the court to represent indigent clients.⁴⁵ Assigned counsel differs from contract attorney implementation systems in that instead of the state having contracts with individual attorneys the state keeps a list of attorneys and the judge assigns attorneys either in a systematic or ad hoc basis.⁴⁶ The ad hoc assignment system is one in which the attorney is assigned almost arbitrarily and often assigned solely upon who is in the courtroom during a defendant's first appearance in court.⁴⁷ These attorneys are generally paid hourly for their own work but must petition the court for more funds to pay for investigators, expert witnesses, or any other costs relevant to building an effective defense.⁴⁸ The other method of assigning counsel for indigent clients is the systematic or coordinated assigned counsel program.⁴⁹ These generally involve some kind of oversight body who sets standards that attorneys must meet in order to be admitted to the program.⁵⁰ This system is the one preferred by the American Bar Association as it creates a better system for guaranteeing quality of defense.⁵¹ The states that use assigned counsel programs are Alabama, Maine, and Massachusetts.⁵² These attorneys face a multitude of problems but the issue of a conflict of interest is particularly worrying;

⁴⁴ Taylor.

⁴⁵ US Legal, “Assigned Counsel Law and Legal Definition | USLegal, Inc.”

⁴⁶ Spangenberg and Beeman, “Indigent Defense Systems in the United States.”

⁴⁷ Spangenberg and Beeman.

⁴⁸ Spangenberg and Beeman.

⁴⁹ Spangenberg and Beeman.

⁵⁰ Spangenberg and Beeman.

⁵¹ Spangenberg and Beeman.

⁵² Gideon at 50, “Gideon at 50 - 50th Anniversary of Gideon vs. Wainwright.”

“appointed counsel are impeded by conflicts of interest on the part of both the appointing judges and the appointed counsel, limited compensation, incentives created by that compensation, and relative isolation.”⁵³ This conflict of interest can be very detrimental to the conviction rates for attorneys and the jail time and trial outcomes for indigent clients.

Finally, mixed or county based systems use a mix of the above implementation systems to provide services to the indigent.⁵⁴ Arizona, California, Georgia, Idaho, Kansas, Louisiana, Mississippi, Montana, Nebraska, Nevada, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, and West Virginia all use mixed implementation models.⁵⁵ These mixed implementation systems can vary from the majority of the state using one implementation system with a few exceptions to initial trials using one implementation system while appeals are handled by another. For example, Pennsylvania funds and implements their indigent defense services on a completely county based method, meaning that each county has a slightly different program.⁵⁶ In Pennsylvania, each county has a “Chief Public Defender” and this is the only oversight that the counties indigent defense services have.⁵⁷ In fact, some counties only employ that Chief Public Defender for every indigent client in the county.⁵⁸ Philadelphia County, the largest county in Pennsylvania,

⁵³ Anderson and Heaton, “Measuring the Effect of Defense Counsel on Homicide Case Outcomes.”

⁵⁴ Pfaff, *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform*.

⁵⁵ Gideon at 50, “Gideon at 50 - 50th Anniversary of Gideon vs. Wainwright.”

⁵⁶ Owens et al., “Indigent Defense Services in the United States, FY 2008–2012 – Updated.”

⁵⁷ Gideon at 50, “Gideon at 50 - 50th Anniversary of Gideon vs. Wainwright.”

⁵⁸ Gideon at 50.

has a Chief Public Defender that oversees the long standing contract system with the Defender Association of Philadelphia, a non-profit legal defense firm.⁵⁹

Where the funding for these different implementation systems creates another opportunity for variation in indigent defense across the country. There are 24 states that fund indigent defense completely from the state budget and state generated funds.⁶⁰ There does not seem to be a single unifying factor or trend between these states other than their funding system for indigent defense that would predict this behavior or string them together in a narrative that concerns indigent defense funding. The other popular method for funding distribution for indigent defense is a mix of funding contributions from local (usually county) and the state government.⁶¹ The states that do this mixed funding system can range from a state like Arizona receiving 99% of the indigent defense funding from the county with and a 1% contribution from the state to something like the Wisconsin system with almost the complete opposite with 93% of the indigent defense funding coming from the state and 7% coming from the county.⁶²

Pennsylvania is the only state in the country that funds completely by the county level.⁶³ This solely county funded system does pose many problems to the kind of legal representation that comes from indigent defense systems. County budgets for the most part are funded through property taxes, which, especially in a state like Pennsylvania with such high demographic and economic variance, can result in a huge disparity in the level of funding given to each state.⁶⁴ Counties with low property taxes and low demand for

⁵⁹ Gideon at 50.

⁶⁰ Gideon at 50.

⁶¹ Gideon at 50.

⁶² Gideon at 50.

⁶³ Gideon at 50.

⁶⁴ Meyer, "Despite Outlier Status, Pa. Lawmakers Don't Make Public Defense a Priority."

indigent defense services can be as poorly staffed as counties with high property taxes and high demand.⁶⁵ The funding match per capita for counties with lower property taxes can at times be in even more need for funding in indigent defense cases, “a rural county, with fewer resources, may be financially crippled by the need to fund the defense of a single homicide case.”⁶⁶ This inability to represent an indigent client in a single homicide case is in blatant violation of the ruling of *Gideon* but there is not a reform in sight of Pennsylvania politics to address this problem. There has not been much attention to this fact in any Pennsylvania news media however. In research for this project, there were only three relatively high profile pieces on the issue. One entitled “Despite outlier status PA lawmakers don’t make public defense a priority” outlines exactly the level of apathy from the Pennsylvania legislature towards fixing the problem despite having commissioned a report that came back with scathing results in 2011.⁶⁷

Where does funding goes when defense is funded well

The most glaring answer to where additional funding would go would be to pay the salaries of additional attorneys to handle increasingly oppressive caseloads. However, there are a multitude of other necessities for these offices to create an effective defense for clients.⁶⁸ In a study of indigent defense throughout the United States

⁶⁵ Lefstein and Spangenberg, “Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel.”

⁶⁶ Lefstein and Spangenberg.

⁶⁷ Meyer, “Despite Outlier Status, Pa. Lawmakers Don’t Make Public Defense a Priority.”

⁶⁸ Taylor, “System Overload: The Costs of Under- Resourcing Public Defense”; Lee, Ostrom, and Kleiman, “The Measure of Good Lawyering: Evaluating Holistic Defense in Practice”; Frederique, Joseph, and Hild, “What Is the State of Empirical Research on Indigent Defense Nationwide? A Brief Overview and Suggestions for Future Reseach”; Lefstein and Spangenberg, “Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel.”

researchers compiled a description of what sufficient funding for indigent defense services would accomplish or look like.⁶⁹

“Resources, in the broadest sense, can include funding, time, training, investigative services, independence and oversight. All of these are intertwined and not easily disentangled. For example, a well-funded public defense system is likely to be able to hire more public defenders, which in turn, will reduce caseloads and give defenders more time on each case. At the same time, an adequately funded agency with independence and oversight has control over how those resources are used. A lack of independence and other structural problems further contribute to struggling public defense systems.”⁷⁰

A study of legal offices in general show how the most effective defense does not look only at the immediate situations of clients but looks at the case as a holistic process to address all factors of the defendants life, aptly namely holistic defense.⁷¹ Though holistic defense is a relatively new term and has not been studied extensively, elements of it that make for more effective indigent defense have been represented in the literature.

The first is the fact that higher funded indigent defense systems tend to have lower caseloads per attorney which can lead to an overall better level of defense.⁷² The American Bar Association created a publication with the standards that should be upheld in order for indigent defense to be considered effective;

1. The public defense function, including the selection, funding, and payment of defense counsel, is independent.
2. Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.

⁶⁹ Taylor, “System Overload: The Costs of Under- Resourcing Public Defense.”

⁷⁰ Taylor.

⁷¹ Lee, Ostrom, and Kleiman, “The Measure of Good Lawyering: Evaluating Holistic Defense in Practice.”

⁷² Frederique, Joseph, and Hild, “What Is the State of Empirical Research on Indigent Defense Nationwide? A Brief Overview and Suggestions for Future Research.”

3. Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.
4. Defense counsel is provided sufficient time and a confidential space within which to meet with the client.
5. Defense counsel's workload is controlled to permit the rendering of quality representation.
6. Defense counsel's ability, training, and experience match the complexity of the case.
7. The same attorney continuously represents the client until completion of the case.
8. There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.
9. Defense counsel is provided with and required to attend continuing legal education.
10. Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.⁷³

These standards concern themselves mostly with ensuring that effective representation is guaranteed by the attorneys having enough time and resources to adequately represent their clients.⁷⁴ This is particularly relevant when considering the caseloads of indigent defense attorneys. As a supplement to these standards the American Bar Association released caseload standards of what would be the maximum amount of cases an attorney could work on and still provide their clients with an effective defense.⁷⁵ The A.B.A.

⁷³ American Bar Association, "Ten Principles of a Public Defense Delivery System."

⁷⁴ American Bar Association.

⁷⁵ Sixth Amendment Center, "Sufficient Time to Ensure Quality Representation - ABA Principle 4 | Sixth Amendment Center."

cited a report titled *Justice Denied: America's Continued Neglect of Our Constitutional Right to Counsel* summation of the problem with excessive caseloads;

“As a consequence [of excessive caseloads], defense lawyers are constantly forced to violate their oaths as attorneys because their caseloads make it impossible for them to practice law as they are required to do according to the profession’s rules. They cannot interview their clients properly, effectively seek their pretrial release, file appropriate motions, conduct necessary fact investigations, negotiate responsibly with the prosecutor, adequately prepare for hearings, and perform countless other tasks that normally would be undertaken by a lawyer with sufficient time and resources. Yes, the clients have lawyers, but lawyers with crushing caseloads who, through no fault of their own, provide second-rate legal services, simply because it is not humanly possible for them to do otherwise.”⁷⁶

Studies of indigent defense systems across the country showed that 73% of the county based public defense systems lacked enough attorneys to meet these standards.⁷⁷ For state wide offices, 15/19 or 79% of the reporting offices exceeded these recommended caseload limits and as a whole indigent defense offices had a median of 67% of the attorneys necessary to meet these guidelines.⁷⁸ One study of these excessive caseloads concluded that “As a consequence [of excessive caseload] even the best-intentioned lawyers cannot render competent and effective defense services to all of their clients.”⁷⁹ The high caseloads, excessive hours and low pay in many cases lead to an extremely high burnout rate for attorneys with high turnover and lower training for the attorneys that are representing clients.⁸⁰ Additionally, indigent defense services are almost always

⁷⁶ Lefstein and Spangenberg, “Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel.”

⁷⁷ Taylor, “System Overload: The Costs of Under- Resourcing Public Defense.”

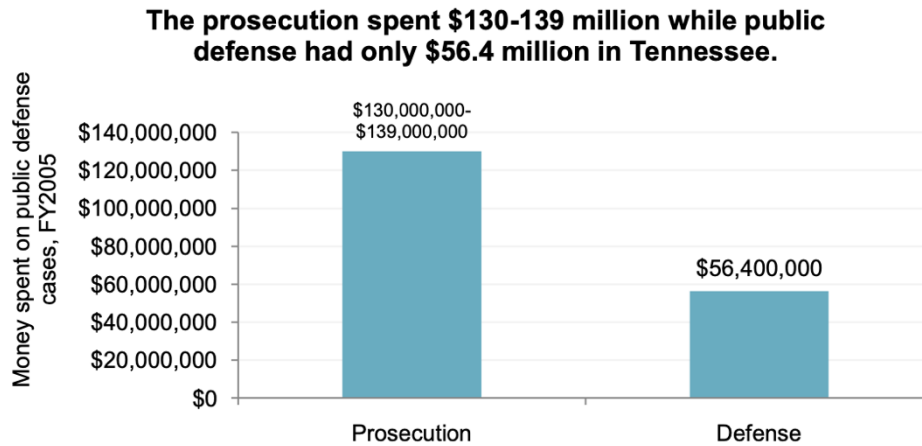
⁷⁸ Taylor.

⁷⁹ Lefstein and Spangenberg, “Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel.”

⁸⁰ Taylor, “System Overload: The Costs of Under- Resourcing Public Defense.”

disproportionately underfunded compared to their prosecutorial counterparts, very often, with prosecutorial offices receiving twice as much funding as their indigent defense counterpart.⁸¹

Figure 1: Funding for Prosecution vs. Indigent Defense Services



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In 2008, local and state governments spent over 200 billion dollars on criminal justice activities broadly only 4.5 billion dollars was allocated for indigent defense services.⁸³ This statistic shows the fact that even in poorer states, there is an excessive amount of funding spent on criminal justice activities and that indigent defense services are simply being left behind in the discussions in comparison to the prosecutorial, police, and correctional counterparts. For example, in Mississippi in 2012, the poorest state in the country, the state government spent almost 340 million dollars on corrections and only 4,307,000 dollars on its indigent defense services.⁸⁴

⁸¹ Taylor.

⁸² Taylor.

⁸³ Pfaff, *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform*.

⁸⁴ Herberman, "State Government Indigent Defense Expenditures, FY 2008–2012 - Updated"; Mississippi Department of Corrections, "Research & Statistics."

This disparity in funding means that prosecutors can charge and follow through with vastly more cases than the indigent defense services can keep up with leading these attorneys to seek out and resort to plea deals to settle the vast majority of their cases.⁸⁵ A study of indigent defense services found that 95% of cases handled by these services end up closing the case with a plea deal.⁸⁶ Plea deals have seen a dramatic rise in the United States in recent years a trend explained by the National Association of Criminal Defense Lawyers as;

“Guilty pleas have replaced trials for a very simple reason: individuals who choose to exercise their Sixth Amendment right to trial face exponentially higher sentences if they invoke the right to trial and lose... This [trial] penalty is now so severe and pervasive that it has virtually eliminated the constitutional right to a trial. To avoid the penalty, accused persons must surrender many other fundamental rights which are essential to a fair justice system.”⁸⁷

These plea deals take less time for the defense attorneys and generally result in less prison time for defendants and are much easier for prosecutors so many parties do push for them.⁸⁸ The problem then becomes that defendants (regardless of if they have actually committed a crime or not) have a criminal record, which often leads to a cycle of criminality.⁸⁹ In California for instance, a guilty plea can become one of three strikes which can prevent future employment often pushing people to be further entangled with the criminal justice system.⁹⁰ The more time per case for prosecution offices also allows

⁸⁵ Laughland and Mathieu-Léger, “The Human Toll of America’s Public Defender Crisis.”

⁸⁶ Laughland and Mathieu-Léger.

⁸⁷ National Association of Criminal Defense Lawyers, “The Trial Penalty.”

⁸⁸ The Innocence Project, “Report.”

⁸⁹ The Innocence Project.

⁹⁰ The Innocence Project.

them to decide which cases they wish to push towards trial, which they wish to leverage plea deals more aggressively with and which cases they wish to drop the charges for completely.⁹¹ Indigent defense offices do not have this luxury, they must defend all cases that prosecutors have brought charges for and because of the overwhelming caseloads often do not have to luxury of time to look into what cases have a viable trial defense and which must resort to a plea deal.⁹² One narrative study of a county in Georgia saw only one public defender for the entire county who sustained a private practice as well.⁹³ The author saw this attorney plead out 48 cases in a row for this relatively small county of only about 20,000 people.⁹⁴ This pressure to take a plea deal for clients can lead to people agreeing to staggering fines, jail time, and a permanent record that could be avoided with lower caseloads for indigent defense attorneys.⁹⁵

This disparity between prosecutorial offices and indigent defense services extends beyond the pure funding. The most pressing example is the presence (or in many more cases lack thereof) of investigators.⁹⁶ Prosecutorial offices do not have to hire or retain investigators to build a case to present at trial.⁹⁷ These resources come built into the justice system as the police officers, sheriffs, and other law enforcement services work closely with prosecutors.⁹⁸ Indigent defense services in order to build a case however, must hire and retain their own investigators.⁹⁹ In fact, 87% of small public defense

⁹¹ Pfaff, *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform*.

⁹² Pfaff.

⁹³ Pfaff.

⁹⁴ Pfaff.

⁹⁵ Pfaff.

⁹⁶ Pfaff.

⁹⁷ Pfaf,

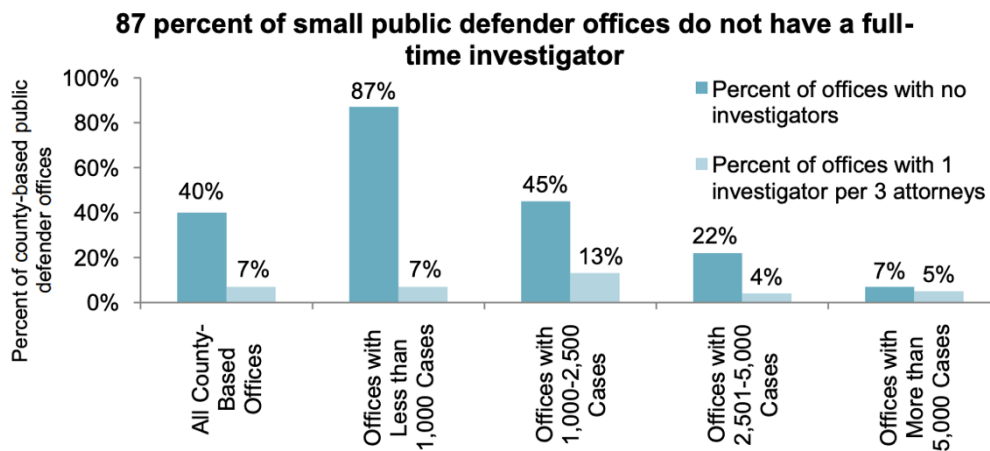
⁹⁸ Pfaff.

⁹⁹ Pfaff.

offices do not have a full-time investigator on staff.¹⁰⁰ This inability to find evidence to build a case again leads to the high propensity for recommending plea deals to clients as well as a further disparity between prosecutors and indigent defense services.¹⁰¹

I worked as an intern at the Office of the Public Defender in Rockville, Maryland and I was hired as an investigative intern for the office. My cohort and I were sent, with very little training, to collect witness statements, issue subpoenas, and check alibis to help the attorneys build cases but the office did not retain a full-time investigator and instead relied on undergraduate interns. While police officers have to be admitted to and graduate from the police academy for their training as investigators my cohort and I were only given a week of very basic investigator training to serve the same function on the defense side.

Figure 2: Indigent Defense Services Offices with Investigators



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¹⁰⁰ Taylor, "System Overload: The Costs of Under-Resourcing Public Defense."

¹⁰¹ Taylor.

¹⁰² Farole and Langton, "County-Based and Local Public Defender Offices, 2007."

Beyond investigators, indigent defense services may even lack the resources to communicate effectively with their clients. All offices are required to provide in court interpreters for indigent clients, but this does not always extend to the conversations that are necessary to be had outside of court itself.¹⁰³ While working at the Office of the Public Defender, I also worked as a Spanish language interpreter for the attorneys and their clients. In Montgomery County, 41.5% of the population speaks a language other than English and the office does not retain a full-time translator for any language.¹⁰⁴ Again, this responsibility was left to myself and some of the other undergraduate interns and law clerks, most of whom did not have formal translation training.

Finally, the availability of other support personnel has been shown to be extremely necessary to be able to provide effective criminal defense for indigent defense services.¹⁰⁵ The introduction of a social worker in the defense process has been shown to greatly reduce the likelihood of recidivism and excessive prison time for clients of indigent defense services.¹⁰⁶ Social workers lower this risk as they direct clients of indigent defense services to mental health and substance abuse programs instead of only incarceration which can assist in addressing the problems at the root of crimes committed as opposed to simply wielding a retributive stick at people convicted of crimes.¹⁰⁷ This referral to mental health and substance abuse programs has been shown to save government spending down the line, “Kentucky implemented such a program [social worker program] and found that social workers saved the state 3.25 dollars in criminal

¹⁰³ Legal Aid Society of Cleveland, “Do I Have the Right to an Interpreter?”

¹⁰⁴ Buchanan and Orme, “Impact of Social Work Practice in Public Defense.”

¹⁰⁵ Buchanan and Orme.

¹⁰⁶ Buchanan and Orme.

¹⁰⁷ Giovanni and Patel, “Gideon at 50: Three Reforms to Revive the Right to Counsel.”

justice costs for every 1 dollar in social worker salaries. Social service workers in Rhode Island saved the state 15 million dollars.”¹⁰⁸ This statistic shows the staggering amount of money that could be saved by state governments by simply providing funding for support personnel in indigent defense offices.

The Political Reality of Indigent Defense Funding

While there have been many issues found in the literature surrounding indigent defense services, the findings of these studies have not been shown to change the political popularity of funding for these services. Though all people could most likely recite the Miranda rights given to people arrested in the United States including the right to an attorney, not all support increasing funding indigent defense services. A 2000 study found that only two-thirds of respondents said that attorneys should be provided for the poor, a statistic in direct odds with the supreme court mandate for free legal services for indigent clients.¹⁰⁹ Furthermore, only 17% of the respondents believed that funding should be increased for indigent defense services and this number rose to only 33% after some discussion of the issue.¹¹⁰ This discussion of the issue of funding indigent defense services involved informing respondents of the current state of indigent defense including the number of criminal defendants who cannot afford private legal representation and dramatic underfunding of the offices attempting to meet this demand.¹¹¹ Another study found that the level of funding for welfare programs was not a predictor of funding and

¹⁰⁸ Giovanni and Patel.

¹⁰⁹ Russonello and Stewart Research and Communications, “Developing a National Message for Indigent Defense: Analysis of National Survey.”

¹¹⁰ Russonello and Stewart Research and Communications.

¹¹¹ Russonello and Stewart Research and Communications.

support for indigent defense offices.¹¹² This is surprising considering that funding for welfare programs could be comparable to the support for funding for indigent defense services.¹¹³ Additionally, support for the politics of the “punitive turn” (the trend towards mass incarceration and harsher punishments in the criminal justice system) predict less support for indigent defense.¹¹⁴ This inability to find political factors that predict support for funding for indigent defense creates a problem for studying the motivations for state legislatures to recommend increases or decreases in funding for indigent defense services.

Mass Incarceration Rates

Unlike indigent defense services, mass incarceration does have a large backing of academic studies and is likewise much more discussed in popular media and civil rights movements. It is however very related to the study of indigent defense. Many studies of prison populations have found that roughly 75 percent of people incarcerated were indigent when they stood trial.¹¹⁵ This dramatic number shows how any discussion of reducing the incarcerated population must inherently involve a discussion of the funding provided for and the quality of our indigent defense services.

History of Mass Incarceration

The general population of the United States accounts for less than five percent of the world’s total, but more than twenty percent of the world’s total prison population is

¹¹² Farole and Langton, “County-Based and Local Public Defender Offices, 2007.”

¹¹³ Davies and Worden, “Local Governance and Redistributive Policy.”

¹¹⁴ Davies and Worden.

¹¹⁵ Frontline, “Stats & Facts | Real Justice.”

claimed by the United States.¹¹⁶ This massive and unproportionate number has not, however, always been the case.¹¹⁷ Between 1940 and 1975 the prison population in the United States hovered around 100 incarcerated people per 100,000 of the total population.¹¹⁸ With the introduction of policies of the Nixon Administration and other administrations following the rate of incarcerated people exploded to an average of 500 people incarcerated per 100,000 by the 2000's.¹¹⁹ Policies like mandatory minimums, broken windows policing, and the War on Drugs contributed to this explosion of incarceration which overwhelmingly impacts low income people and people of color. In the same polls of the incarcerated population, per 100,000 people the incarceration rate of Black Americans is 2,207, of Latinx Americans is 966, and of White Americans the rate is only 380.¹²⁰ For low income persons, in 2014, the median income of incarcerated people was 19,185 dollars prior to their incarceration, 41% less than those who are not incarcerated.¹²¹ Despite their stated purpose of reducing crime however, these policies have done little to impact the overall crime rates in the United States.¹²² In fact, there have been many studies that suggest the opposite.¹²³ Instead of reducing crime, the fact of someone spending time in prison can be shown to increase the likelihood of recidivism for that individual.¹²⁴

¹¹⁶ Davis, *Are Prisons Obsolete?*

¹¹⁷ Rafael and Stoll, *Why Are So Many Americans in Prison?*

¹¹⁸ Rafael and Stoll.

¹¹⁹ Rafael and Stoll.

¹²⁰ Prison Policy Initiative, "U.S. Incarceration Rates by Race."

¹²¹ Prison Policy Initiative, "Prisons of Poverty."

¹²² Davis, *Are Prisons Obsolete?*

¹²³ Mears et al., "Recidivism and Time Served in Prison."

¹²⁴ Mears et al.

Figure 3: Incarceration rates since 1925



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Current State of Mass Incarceration

Currently, the overcriminalization of petty offenses leads to higher arrest and incarceration rates across the country.¹²⁶ The United States spends 79 billion dollars annually on corrections which averages to 31,286 dollars spent annually per prisoner within the criminal justice system.¹²⁷ Additionally, the private interests that control much of the prison system have a vested interest in continuing the growth of the prison population.¹²⁸ For profit prisons create a market for incarcerated people that creates a culture of quota meeting in order to fill prison beds in order to generate more capital for those that control the prisons.¹²⁹ Beyond the monetary incentives of for profit prisons, the issue of prison gerrymandering presents another incentive for lawmakers to keep the

¹²⁵ Prison Policy Initiative, “Incarceration Rate, 1925-2008.”

¹²⁶ Giovanni and Patel, “Gideon at 50: Three Reforms to Revive the Right to Counsel.”

¹²⁷ Giovanni and Patel.

¹²⁸ Davis, *Are Prisons Obsolete?*

¹²⁹ Davis.

prison populations high.¹³⁰ Prison gerrymandering is the process of lawmakers deciding (despite the fact that incarcerated individuals in most places are disenfranchised) where the population of prisons is counted for the drawing of district boundaries, a process highly reminiscent of the three-fifths compromise.¹³¹ The question for this issue is whether incarcerated individuals should be counted as living at their most recent address before they were incarcerated or if their address should be recorded as the prison they are incarcerated in.¹³² The motivation for the latter is that prisoners (most of whom are people of color who tend to vote more liberal) would be removed from the cities that they generally live in to rural areas creating many more districts in rural areas which would otherwise not exist.¹³³ A study of Pennsylvania districts found that eight congressional districts would not meet federal population requirements if they had not counted incarcerated individuals in that district.¹³⁴

Indigent Defense Funding and Mass Incarceration

Currently, an average of 80% of people that are charged with a crime in the United States are eligible for indigent defense services.¹³⁵ This number varies greatly nationally however. For example, in Wisconsin, over 93% of people that are arrested are eligible for a public defender.¹³⁶

¹³⁰ Pfaff, Personal conversation.

¹³¹ Pfaff.

¹³² Pfaff.

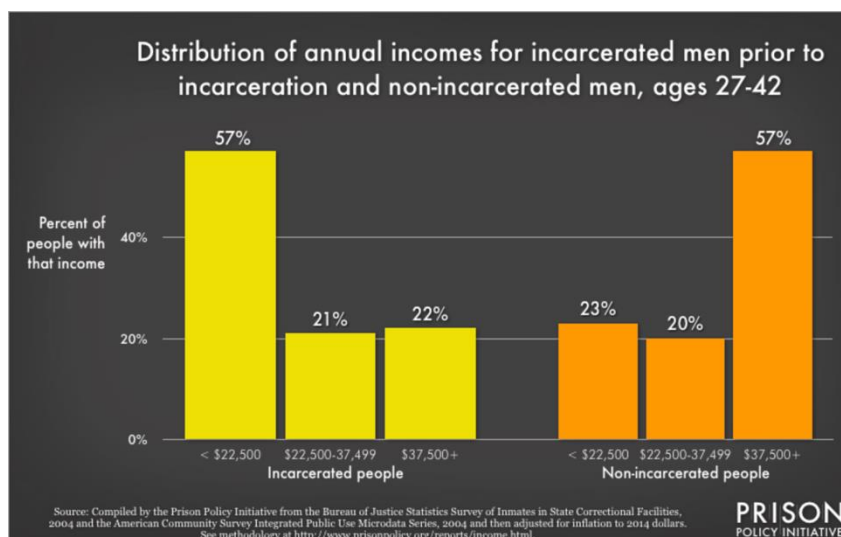
¹³³ Pfaff.

¹³⁴ Wagner and Lavarreda, "Importing Constituents Pennsylvania."

¹³⁵ Pfaff, *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform*.

¹³⁶ Taylor, "System Overload: The Costs of Under-Resourcing Public Defense."

Figure 4: Annual incomes of incarcerated and non-incarcerated men



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Despite this massive link between people requiring indigent defense services and the representation of low income people in the prison population, there have not been any empirical studies on the relationship between funding for indigent defense services and mass incarceration.

There have, however, been pieces written by scholars of criminal justice regarding this relationship.¹³⁸ One article found that “In 2008, for every dollar spent on public defense, taxpayers spend nearly 14 on corrections.”¹³⁹ Scholars have found that

¹³⁷ Prison Policy Initiative, “Distribution of Annual Incomes for Incarcerated Men Prior To...”

¹³⁸ Yang and Carlson, “Missouri Public Defenders Are Overloaded with Hundreds of Cases While Defendants Wait in Jail”; Hughes and Fenster, “Overloaded Public Defense Systems Result in More Prison Time, Less Justice — Justice Policy Institute”; Rapping, “Public Defenders Key to Reducing Mass Incarceration”; Taylor, “System Overload: The Costs of Under- Resourcing Public Defense”; Laughland and Mathieu-Léger, “The Human Toll of America’s Public Defender Crisis”; Berlatsky, “Want To Reduce Mass Incarceration?”; Pfaff, *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform*; Pfaff, Personal conversation; Pfaf, “Why Public Defenders Matter More Than Ever in a Time of Reform.”

¹³⁹ Taylor, “System Overload: The Costs of Under- Resourcing Public Defense.”

the lack of quality defense can lead to longer pre-trial defense for those who cannot afford the cash bail required to be removed from pretrial detention.¹⁴⁰ Additionally, scholars have found that the lack of quality defense can lead to excessive prison sentences for defendants.¹⁴¹ The increase in guilty plea bargains that accompanied increased charges and excessive caseloads for public defense have led to prosecutors proposing slightly reduced sentences for guilty pleas but for the small proportion of cases that do go to trial defendants, if found guilty, are given excessive prison sentences.¹⁴² The articles surrounding these topics together propose higher funding for public defense as a solution for mass incarceration but do not have an empirical backing to them.¹⁴³

Gaps in the Literature

The largest gap in the literature as it stands is the fact that there is no empirical study on the link between the levels of funding for public defense and the rates of incarceration for those communities. Across the board however, there is a surprisingly low number of studies that concern indigent defense funding. There are no studies that cover the degrees of efficacy of different indigent defense implementation systems.¹⁴⁴ There is also a dearth in literature regarding political culture surrounding indigent defense funding and popular support for it. This lack of literature could be partially explained by the relative novelty of mandated indigent defense services across the country. Though

¹⁴⁰ Taylor.

¹⁴¹ The Innocence Project, "Report."

¹⁴² The Innocence Project.

¹⁴³ Pfaf, "Why Public Defenders Matter More Than Ever in a Time of Reform"; Pfaff, *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform*; Berlatsky, "Want To Reduce Mass Incarceration?"; Rapping, "Public Defenders Key to Reducing Mass Incarceration."

¹⁴⁴ Davies, "EDITOR'S INTRODUCTION."

the ruling in *Gideon* came out in 1963, its full implementation across the country took many years to come to fruition. Additionally, once it was a relatively fleshed out system, the people in need of or impacted by these systems and services are generally those that are thought of as undesirable in the United States i.e. low income people, people of color, and those convicted of crimes. All people that academic writing often forgets about.

Finally for indigent defense services, it is necessary to study the reasons for these chronic underfunding and the policies that must be put in place to improve the system as a whole.

With regards to mass incarceration, more research is needed on the political atmosphere surrounding mass incarceration and how that plays into the future of certain inmates and criminal defendants.

Chapter 3: Methods

The previous chapter outlined the existing literature surrounding indigent defense services, incarceration rates, and the small amount of literature on the relationship between the two. However there persist a large gap in this literature. For the most part, there is very little research on indigent defense services as a whole and the impact that these services can have on the lives of the people and communities that they represent. Because of this gap, this study attempts to answer the following question: what impact does the level of funding for indigent defense services have on incarceration rates?

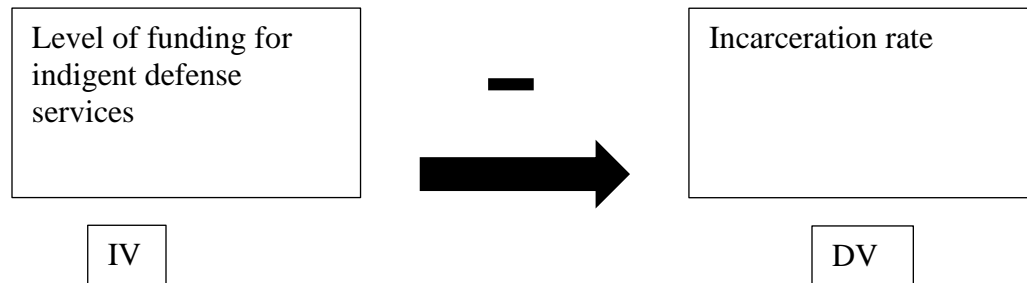
This chapter will address the methodology that will be used to test this question. I will first list my hypotheses and arrow diagrams depicting this relationship. I will also discuss the cases I will be looking at to test this hypothesis. I will then list and describe major and control variables and the ways in which each of these variables will be operationalized. Finally, I will describe the methodology and justification for this method for testing the relationship between these variables.

Hypotheses

H_1 : *Increased funding for indigent defense services lowers rates of incarceration in the communities that these services represent.*

H_{null} : *The level of funding for public defense will have no impact on incarceration rates of the communities that these services represent.*

Figure 5: Hypothesis arrow diagram



The level of funding for indigent defense services is my independent variable and the incarceration rate is the dependent, with the other control variables being entered in as a part of my test.

Case Selection

I will be looking at information from 49 states and all of the counties in Pennsylvania. I will not be including Alaska in my study because their funding level is almost double the next highest per capita funding for indigent defense services. In 2018, the Alaska House Finance committee approved a measure to increase funding for their public defense department by 1 million dollars in order to bring the caseloads of the public defender's office closer to the American Bar Association standards.¹⁴⁵ There is not a discernable difference between Alaska and other states with much less funding allocated to indigent defense, only the fact that members of the Alaska House Finance Committee cited an ethical obligation to increasing funding for the Public Defender

¹⁴⁵ Kitchenman, "Lawmakers Add Funding for Public Defenders."

Agency.¹⁴⁶ Because Alaska is so different from the other states in this respect it could negatively affect the statistical significance of the data from the other states and not show the trend of the data nationally to an accurate degree.

I will be looking at the data from all of the counties in Pennsylvania for a few reasons. First, as stated in the previous chapter, Pennsylvania is the only state that leaves funding and implementation of the mandate from *Gideon* of providing indigent clients legal services completely to each of the counties. There is no statewide oversight or funding given to the county governments which is sharply different from every other state in the country. Second, the demographic and urban makeup of Pennsylvania is very representative of the rest of the United States as a whole. The racial and age breakdown of Pennsylvania is very comparable to the United states a whole as shown by the chart below. Additionally, using Pennsylvania as a case study will give information on many different implementation systems within similar demographic groups, thus showing the impact of funding across the board. Finally, focusing in on one state can create a more reliable study as it controls for a generally similar attitude towards criminal justice within one state, which is virtually impossible within the scope of this study when studying a country of 330 million people.

¹⁴⁶ Kitchenman, "Lawmakers Add Funding for Public Defenders."

Figure 6: Racial and age breakdown of Pennsylvania vs The United States

All Topics	United States	Pennsylvania
Population estimates, July 1, 2019, (V2019)	328,239,523	12,801,989
Age and Sex		
Persons under 5 years, percent	6.1%	5.5%
Persons under 18 years, percent	22.4%	20.7%
Persons 65 years and over, percent	16.0%	18.2%
Female persons, percent	50.8%	51.0%
Race and Hispanic Origin		
White alone, percent	76.5%	81.8%
Black or African American alone, percent (a)	13.4%	12.0%
American Indian and Alaska Native alone, percent (a)	1.3%	0.4%
Asian alone, percent (a)	5.9%	3.7%
Native Hawaiian and Other Pacific Islander alone, percent (a)	0.2%	0.1%
Two or More Races, percent	2.7%	2.1%
Hispanic or Latino, percent (b)	18.3%	7.6%
White alone, not Hispanic or Latino, percent	60.4%	76.1%

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Additionally, Pennsylvania is home to two relatively large cities as well as a good representation of rural and suburban areas. Finally, having a more granular view of funding disparities between urban, suburban, and rural communities can improve upon the legitimacy and external validity of this study.

Independent and Dependent Variables

Level of Funding for Indigent Defense Services

For this variable I will be looking at the per capita funding awarded to indigent defense services for both groups. Indigent defense funding is defined as the constitutionally mandated free legal services to those accused of crimes who cannot afford it.¹⁴⁸ I will be looking at indigent defense funding across all of the

¹⁴⁷ US census, "U.S. Census Bureau QuickFacts."

¹⁴⁸ National Center for State Courts, "[National Center for State Courts."

implementation methods (staffed public defenders, contract attorneys, assigned counsel, and mixed or county based systems).¹⁴⁹ This allows for this study to not be biased towards or against any state that has mixed implementation systems as it records the funding across the board. Though there have been so few studies that deal with indigent defense services this information was readily available thanks to the information provided by the organization “Gideon at 50” and reports by WHYY the Philadelphia NPR station.¹⁵⁰ Operationalization of this variable is simple as it is not necessary to convert the variable to a testable number.

Incarceration Rates

For the 49 states, I will be looking at the incarceration rates published by the Bureau of Justice Statistics from 2016.¹⁵¹ This data recorded every person that was a part of the incarcerated population in 2016 at every level (including jails).¹⁵² In order to operationalize this data I will look at the rate of incarcerated people per 100,000 people that are not incarcerated. This will enable me to not have to control for the total population of the state. Additionally, it is widely agreed in the literature that this is one of the most effective way of measuring incarceration rates.¹⁵³ The other option for this variable would be to look at the incarceration rate per crime committed.¹⁵⁴ Because of the limited timeline and scope of this study as well as the wide variation of crime rates

¹⁴⁹ BJS, “Bureau of Justice Statistics (BJS) - Indigent Defense Systems”; Gideon at 50, “Gideon at 50 - 50th Anniversary of Gideon vs. Wainwright.”

¹⁵⁰ Gideon at 50, “Gideon at 50 - 50th Anniversary of Gideon vs. Wainwright”; Meyer, “Despite Outlier Status, Pa. Lawmakers Don’t Make Public Defense a Priority.”

¹⁵¹ Kaeble and Cowhig, “Correctional Populations in the United States, 2016.”

¹⁵² Kaeble and Cowhig.

¹⁵³ Taylor, “System Overload: The Costs of Under- Resourcing Public Defense.”

¹⁵⁴ Pfaff, Personal conversation.

across the United States the incarceration rate per 100,000 people is the most applicable measure for this study.¹⁵⁵

For the Pennsylvania counties, collecting data on incarceration rates gets more complicated. Each of the counties does not publish how many people it incarcerates or it sends to prisons from their justice systems. Therefore, I decided to calculate what each county's share of Pennsylvania's total incarceration rate ought to be based on other available statistics of their justice systems. In order to do this, I found the total number of plea deals that came out of each county as this is the closest statistic to conviction rates that was available. I then added all of these numbers together and determined the percentage of the total that each county is responsible for. I then apportioned that same percentage to the total incarceration rate of Pennsylvania and attributed the resulting number to each county rounding to the nearest whole number for each county. There is general agreeance in the literature that the rise in the number of plea deals (which is widely attributed to the unequal funding and legal representation between prosecutors and indigent defense services) has increased incarceration across the board as well so I believe this to be a good surrogate for the incarceration numbers themselves.¹⁵⁶ With these numbers for Pennsylvania, they will not be reported as the number of incarcerated people per 100,000 not incarcerated as many of these countries do not meet this threshold 100,000 people as a baseline and cannot therefore be put in that comparison. Because of this, I will control for the population of each county in Pennsylvania when running the test.

¹⁵⁵ Pfaff.

¹⁵⁶ Alkon, "An Overlooked Key to Reversing Mass Incarceration: Reforming the Law to Reduce Prosecutorial Power in Plea Bargaining"; The Innocence Project, "Report."

Control Variables

For the 49 states and granular view of Pennsylvania that I will be testing I will look at various control variables in order to ensure the external validity of this study.

The first group is the racial demographic controls. All literature concerning the United States criminal justice system acknowledges the fact that people of color are disproportionately affected by the system compared to their white counterparts and it is therefore necessary to control for these factors the racial groups. These groups that I have identified are the racial groups that the census asks about including; White, Black, American Indian or Alaskan native, Asian, Native Hawaiian, two or more races, and Latinx.¹⁵⁷

I will also control for the economic factors that are so prevalent in their effect on the system i.e. the poverty and per capita income of every state and county. Specifically, for the Pennsylvania counties I will also control for the median household price as listed on Zillow.¹⁵⁸ Much of where counties get their budget from is based on the property taxes they collect. Because the property taxes in each of the counties can vary so much based on the housing prices it is necessary to control for the housing prices as it can be an indication of the property taxes that the county can collect.¹⁵⁹

Additionally, I will attempt to control for the level of punitiveness of the prosecutorial and police systems. A less punitive prosecutorial force and the rise of progressive prosecutors mainly in cities has reduced the incarceration rates of those

¹⁵⁷ “U.S. Census Bureau QuickFacts.”

¹⁵⁸ Zillow, “Adams County PA Home Prices & Home Values.”

¹⁵⁹ Taylor, “System Overload: The Costs of Under- Resourcing Public Defense.”

communities as prosecutors lean towards less punitive sentences and sentence recommendations for communities.¹⁶⁰ John Pfaff, one of the leading scholars concerning criminal justice reform particularly with reference to indigent defense services, emphasized the fact that prosecutors have an extreme amount of power in criminal trials and this power must be controlled for in order to ensure the external validity of this study.¹⁶¹ In order to control for this, I will record the percentage of the state and county that voted for Donald Trump as president. This can be used as a surrogate for the percentage of the state and county that would lean very conservative and the amount of people that would support more harsh sentences for people who have been convicted of crimes particularly when the sentences would impact people of color.¹⁶²

Additionally, I will look into if the state or county has any elected judges. Elected judges tend to lean towards more harsh sentences as a reelection technique.¹⁶³ Finally, for this measure I will be looking at the percentage of charges dropped in each state and county as a measure of the willingness for prosecutors to be lenient on underserving charges or sentences. For this variable I will look at whether or not there are any elected judges present in the state as reported by Ballotpedia.¹⁶⁴ For operationalization, I will code the presence of elected judges as 0 and non-elected judges as 1. All of the judicial positions in Pennsylvania are selected by partisan election so there is no need to control for this variable.¹⁶⁵

¹⁶⁰ Reisman, "The Rise of the Progressive Prosecutor - Law360."

¹⁶¹ Pfaff, Personal conversation.

¹⁶² Pfaff.

¹⁶³ Oliver, *Elected Judges*.

¹⁶⁴ Ballotpedia, "Judicial Election Methods by State."

¹⁶⁵ Ballotpedia.

Testing Methodology

I will be testing this question using a multivariate regression analysis in SPSS. Because the relationship between these variables has never been tested empirically, I wanted to be able to use a relatively simple test and method to be able to establish a baseline for future testing. I will look for statistically significant results that move in a negative direction as a sign of confirmation of my hypothesis and rejection of the null. I will also be using a multivariate regression as the variables I will be using are continuous as opposed to discrete or categorical.

Conclusion

This study will analyze the impact that levels of funding for indigent defense services has on incarceration by running a multivariate regression and controlling for the variables listed above. The control variables will attempt to serve as a control for the punitive levels of different states and create a high level of external validity for this study.

Chapter 4: Results and Discussion

The previous chapters outlined the current state of the literature regarding this question and the methodology that I would use to test the question and hypothesis. This chapter will go on to discuss the results of the multivariate regression. First I will restate my hypothesis and arrow diagrams and how they relate to the information I was able to collect. I will then display the results of the regressions I ran and the implications of those results. Finally, I will then briefly discuss the limitations of those results.

Hypotheses

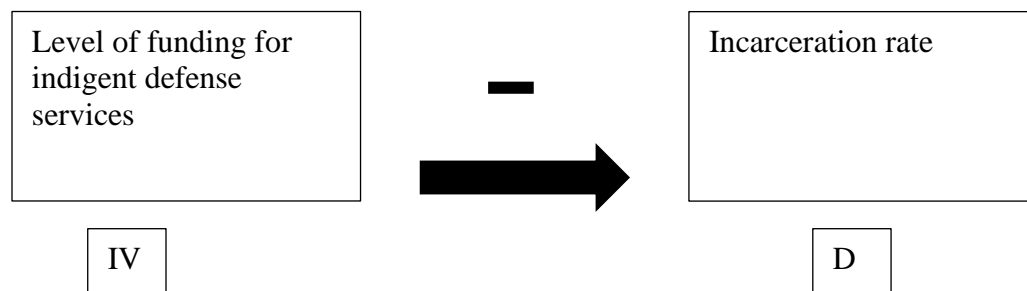
As I stated in the previous chapter because there have been no empirical tests done on the question of this study (What affect does the level of funding for indigent defense services have on incarceration rates?) this study seeks to establish a baseline relationship between the two variables. Keeping that in mind, the hypotheses for this test are:

H₁: Increased funding for indigent defense services lowers rates of incarceration in the communities that these services represent.

H_{null}: The level of funding for indigent defense services will have no impact on incarceration rates of the communities that these services represent.

This can further be illustrated by the arrow diagram below:

Figure 7: Arrow diagram of hypotheses



Results

I will divide the results by the two analyses I ran with one section on the 49 state analysis and one on the Pennsylvania county analysis. Because these two tests needed to have different control variables and different numbers for incarceration rate and levels of funding for indigent defense the results must be viewed as having been run separately but the implications of those results discussed together.

49 State Analysis

I began this study with a simple analysis of the basic relationship between the level of funding for indigent defense services and incarceration rates.

Figure 8: 49 State Indigent defense funding and incarceration (no controls)

Coefficients ^a						
Model		Unstandardized Coefficients		Standardized Coefficients	t	Sig.
		B	Std. Error	Beta		
1	(Constant)	699.528	67.794		10.318	.000
	current per capita funding http://gideonat50.org/in-your-state/alabama/	-8.242	4.451	-.261	-1.852	.070

a. Dependent Variable: Incarceration per 100,000 <https://www.bjs.gov/content/pub/pdf/cpus16.pdf>

This test preliminarily confirmed my hypothesis of the negative relationship between indigent defense funding and incarceration rate but it did not include any of the controls necessary to improve the external validity of the study. This does show that I can expect to find a negative relationship between the main variables, preliminarily confirming the relationship I expected to see in my hypothesis.

Next, I ran a test with the controls that I believed would be the most significant in determining the relationship between the two variables. These include the Black population, latinx population, and the percentage of the population that identifies as two or more races. I also controlled for the poverty rate as well as if the state has any elected judges or not.

Figure 9: 49 State indigent defense funding and incarceration with controls

Coefficients^a						
Model		Unstandardized Coefficients		Standardized Coefficients	t	Sig.
		B	Std. Error	Beta		
1	(Constant)	509.604	78.565		6.486	.000
	current per capita funding http://gideonat50.org/in-your-state/alabama/	-5.025	4.190	-.159	-1.199	.237
	black population	9.717	2.444	.495	3.976	.000
	poverty rate	.130	.095	.163	1.365	.179
	Elected Judges? https://ballotpedia.org/Judicial_election_methods_by_state	-161.126	68.894	-.298	-2.339	.024
	latinx population	3.614	2.319	.199	1.558	.127
	two or more races	3.046	7.786	.051	.391	.698

a. Dependent Variable: Incarceration per 100,000 <https://www.bjs.gov/content/pub/pdf/cpus16.pdf>

Though this test would prove more generalizable due to the presence of the control variables, the results are not statistically significant. Despite the fact that they do not meet this .05 threshold of statistical significance, they are still moving in a negative direction giving an indication that my hypothesis for the state level analysis could still be confirmed in some future study.

Pennsylvania County Data

For the analysis of the Pennsylvania data I followed similar steps to the 49 state analysis. First I ran a simple test with only the first two variables while controlling for the total population of each of the counties because the incarceration rate was not given as the number of people incarcerated per 100,000 but instead solely the number of incarcerated people total.

Figure 10: Pennsylvania indigent defense funding and incarceration without controls

Coefficients^a						
Model		Unstandardized Coefficients		Standardized Coefficients	t	Sig.
		B	Std. Error	Beta		
1	(Constant)	701.386	138.307		5.071	.000
	PD BUDGET PER CAPITA	-78.695	20.290	-.180	-3.879	.000
	Total population	.006	.000	1.010	21.732	.000

a. Dependent Variable: number of incarcerated people

This test was markedly more significant and successful than the 49 state analysis with extremely significant results. This shows that I can expect if not completely

significant results I can expect a confirmation of the negative relationship I expected in my hypothesis. I next ran an analysis with the racial demographic control variables for each of these counties. These include the Black population, Latinx population, and the population that identifies as two or more races. I also included controls for the median household price in order to control for the property taxes that each county can collect. In order to control for the punitive levels of the prosecution and police force I added a variable for the percentage of the cases dismissed by the prosecution. In conversations with experts in studying indigent defense services agree that this can be an effective surrogate measure for the punitive levels in counties.¹⁶⁶

Figure 11: Pennsylvania indigent defense funding and incarceration with controls

Coefficients^a						
Model		Unstandardized Coefficients		Standardized Coefficients	t	Sig.
		B	Std. Error	Beta		
1	(Constant)	187.397	309.052		.606	.547
	PD BUDGET PER CAPITA	-68.826	20.009	-.158	-3.440	.001
	black population	-1.589	4.804	-.013	-.331	.742
	latinx population	-42.813	15.321	-.141	-2.794	.007
	two or more races	658.922	151.218	.248	4.357	.000
	Median household price https://www.zillow.com/adams-county-pa/home-values/ and https://datausa.io/profile/geo/cameron-county-pa#housing (for cameron county)	-.001	.001	-.027	-.592	.556
	% cases dismissed http://www.pacourts.us/news-and-statistics/research-and-statistics/county-caseload-statistics	-29.429	19.656	-.066	-1.497	.140
	Total population	.005	.000	.928	17.011	.000

a. Dependent Variable: number of incarcerated people

¹⁶⁶ Pfaff, Personal conversation.

This test led to an extremely high level of significance in the expected direction of a negative relationship. From this we can understand that in Pennsylvania there is enough data to reject the null hypothesis and the direction of the relationship is confirmed for the other 49 states. We can assume that because of the higher number of cases as well as a more consistent attitude towards criminal justice as it is only studying 12 million people compared to the 330 million of the United States as a whole.

While these data represent a very preliminary dive into the answer to the question of what effect levels of funding for indigent defense services has on incarceration rates it does give an indication towards the impact that adequate funding for indigent legal services can have on dampening the magnitude of the mass incarceration crisis in the United States.

Chapter 5: Conclusion

The aim of this study was to establish if there is a linear relationship between the level of funding spent on indigent defense services and the rate of incarceration in those communities. This study focused on two specific groups of communities, the state-wide funding and the county level funding for Pennsylvania specifically. For the state-wide funding I took the aggregate per capita funding provided to all indigent defense services and compared that to the incarceration rate per 100,000 people in each state. For the county level data for Pennsylvania I looked to the total funding provided for indigent defense and the total number of people incarcerated and controlled for the total population as there is such a disparity in population size and income levels across Pennsylvania.

I hypothesized that the higher the level of funding for indigent defense, the lower the rate of incarceration. I based this hypothesis on the idea that higher funding for indigent defense leads to these services having more access to more attorneys, investigators, and social workers which allows for public defenders to be better opponents to prosecutors which could cause lower incarceration rates as it creates shorter sentences as well as fewer wrongful convictions. My hypothesis was partially confirmed and partially not. The data for Pennsylvania was statistically significant in the negative direction confirming this hypothesis. For the other 49 states however, the results were not statistically significant but did move in a negative direction confirming that there is some measure of a negative relationship between the variables of levels of funding for indigent defense and incarceration.

Limitations

Due to limitations of time, there are a few drawbacks that could affect the reliability of this study. First, there is not a great variety of literature on which to base this study. Because there has not been a wide variety of studies on indigent defense as a topic it was difficult to come up with variables with a high level of external validity as they are mostly based on opinion pieces and interviews I have done.

Second, there is not a direct significant relationship in both groups of variables. Though this can be used to indicate the direction of the relationship of the variables it cannot definitively say that there is a relationship. Though Pennsylvania can indicate a statistically significant relationship, because it is limited to one state we cannot say that there is a universal claim to be made. The fact of statistical significance only for Pennsylvania could potentially be explained by the fact that there can be assumed a generally consistent view towards the criminal justice system. Though there may be a great variation in political opinions across the state the attitudes towards prosecution and policing is generally a more consistent attitude across communities and could lead to a more reliable result in a way that would be difficult to control for.¹⁶⁷

Third, it is difficult to control for all of the factors that can affect incarceration rates as well as funding for indigent defense services. As with many social science questions it is difficult to make any sweeping claims and control for every factor. This is especially true in fields such as criminal justice where the field is changing so much and in many cases is very subject to the opinions of prosecutors and local government officials.

¹⁶⁷ Frey and Teixeira, "The Political Geography of Pennsylvania:"

Suggestions for Future Research

In order to rectify the limitations of this study there are a few suggestions for future research of this question.

First, it would be effective for a future study to utilize time series data to test the same question. In this study, I would take the same variables used in this study and apply a test over a series of years. This study would be able to account for the change of funding for indigent defense services as well as changes in policies that can contribute to higher arrest rates and incarceration.

Second, it would be beneficial to interview and observe individual offices across the country. This would have a twofold benefit for assisting in the better understanding of this research question. First, it would give the ability to learn about the individual differences in every indigent defense office which can affect case outcomes. Second, this individualized attention to certain communities would give the opportunity to better control for the punitive culture of those communities. This study made preliminary steps to control for the level of punitiveness coming from prosecutorial and police offices but further studies would benefit greatly from having more focused and individualized interview based data on this factor.

The Promise of Gideon

The promise of *Gideon* was simple, ensure a fair trial for every person accused of a crime with the availability of free legal services to indigent clients. The reality has become very different, with clients waiting years for trial, attorneys having seven minutes to prepare a case, and thousands upon thousands of clients being forced into guilty pleas.

There is one specific instance that shows this inequity in legal representation between prosecution and indigent defense services being rectified. In 2018, the Alaskan Public Defender went to the Alaskan House Finance Committee chairman and presented evidence of the dramatic state of overwork in the Alaskan Public Defender's office.¹⁶⁸ He stated, "There's a principal of ethics that requires a lawyer not to accept a case if they can't competently handle that case, and not having enough time would be that reason so, we would attempt to refuse cases."¹⁶⁹ The Alaskan House Finance Committee after hearing this evidence and reading the caseload standards from the American Bar Association allocated one million extra dollars for new attorneys in order to meet the national standards and making Alaska such an outlier for per capita indigent defense spending.¹⁷⁰

Alaska is not a state that is usually seen as a leader in criminal justice reform but they made a crucial, logical, choice to fund their indigent defense services adequately in order to meet the recommended caseload standards. Though this happened too recently to know what the impact of this extra funding will have on the incarceration rate, the findings in this study indicate that in coming years, the incarceration rate will decrease and Alaska will be on the way to fulfilling the promise set forth by *Gideon*.

¹⁶⁸ Kitchenman, "Lawmakers Add Funding for Public Defenders."

¹⁶⁹ Kitchenman, Media, and Juneau, "Lawmakers Add Funding for Public Defenders."

¹⁷⁰ Kitchenman, "Lawmakers Add Funding for Public Defenders."

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Appendix:

Figure 1: Funding for Prosecution vs. Indigent Defense Services

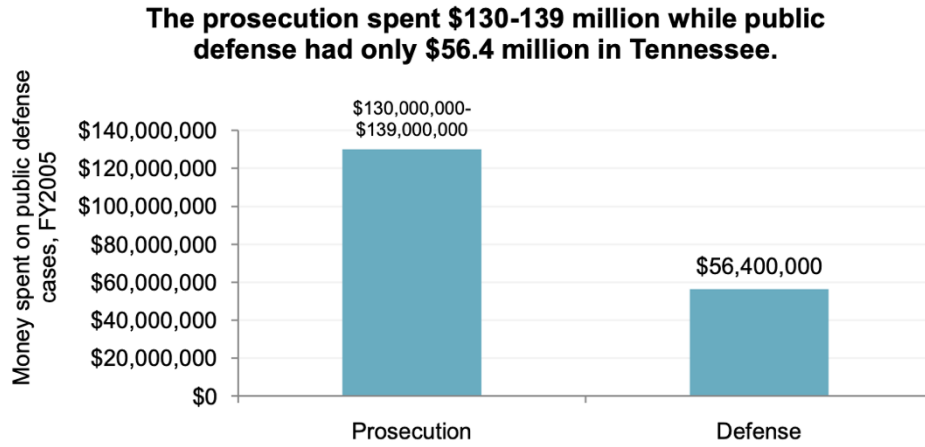


Figure 2: Indigent Defense Services Offices with Investigators

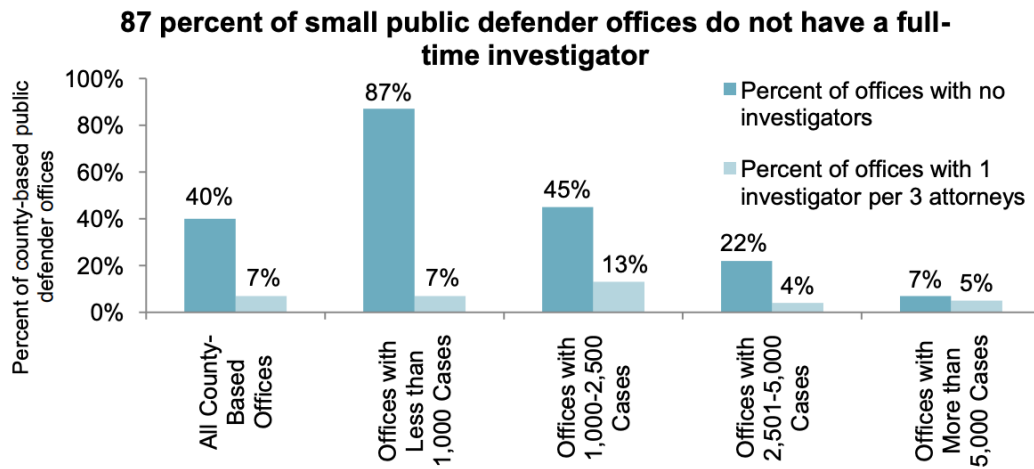


Figure 3: Incarceration rates since 1925

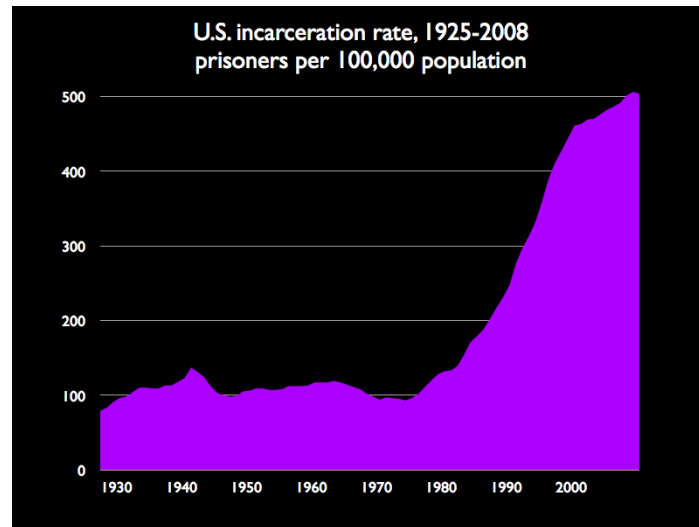


Figure 4: Annual incomes of incarcerated and non-incarcerated men

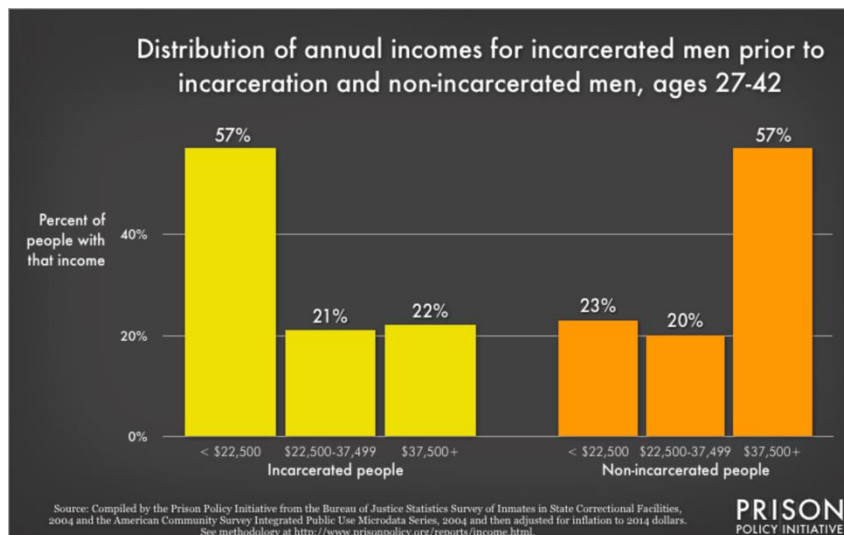


Figure 5: Hypothesis arrow diagram

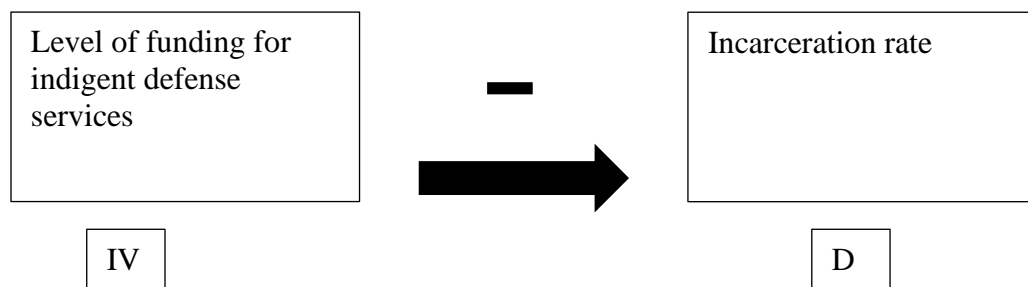


Figure 6: Racial and age breakdown of Pennsylvania vs The United States

All Topics	United States	Pennsylvania
Population estimates, July 1, 2019, (V2019)	328,239,523	12,801,989
Age and Sex		
Persons under 5 years, percent	6.1%	5.5%
Persons under 18 years, percent	22.4%	20.7%
Persons 65 years and over, percent	16.0%	18.2%
Female persons, percent	50.8%	51.0%
Race and Hispanic Origin		
White alone, percent	76.5%	81.8%
Black or African American alone, percent (a)	13.4%	12.0%
American Indian and Alaska Native alone, percent (a)	1.3%	0.4%
Asian alone, percent (a)	5.9%	3.7%
Native Hawaiian and Other Pacific Islander alone, percent (a)	0.2%	0.1%
Two or More Races, percent	2.7%	2.1%
Hispanic or Latino, percent (b)	18.3%	7.6%
White alone, not Hispanic or Latino, percent	60.4%	76.1%

Figure 7: Arrow diagram of hypotheses

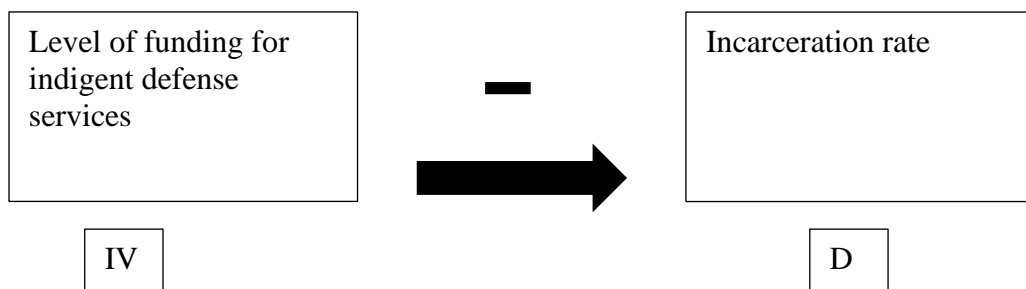


Figure 8: 49 State Indigent defense funding and incarceration (no controls)

Coefficients ^a						
Model		Unstandardized Coefficients		Standardized Coefficients	t	Sig.
		B	Std. Error	Beta		
1	(Constant)	699.528	67.794		10.318	.000
	current per capita funding http://gideonat50.org/in-your-state/alabama/	-8.242	4.451	-.261	-1.852	.070

a. Dependent Variable: Incarceration per 100,000 <https://www.bjs.gov/content/pub/pdf/cpus16.pdf>

Figure 9: 49 State indigent defense funding and incarceration with controls

Coefficients ^a						
Model		Unstandardized Coefficients		Standardized Coefficients	t	Sig.
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1	(Constant)	509.604	78.565		6.486	.000
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	black population	9.717	2.444	.495	3.976	.000
	poverty rate	.130	.095	.163	1.365	.179
	Elected Judges? https://ballotpedia.org/Judicial_election_methods_by_state	-161.126	68.894	-.298	-2.339	.024
	latinx population	3.614	2.319	.199	1.558	.127
	two or more races	3.046	7.786	.051	.391	.698

a. Dependent Variable: Incarceration per 100,000 <https://www.bjs.gov/content/pub/pdf/cpus16.pdf>

Figure 10: Pennsylvania indigent defense funding and incarceration without controls

Coefficients ^a						
Model		Unstandardized Coefficients		Standardized Coefficients	t	Sig.
		B	Std. Error	Beta		
1	(Constant)	701.386	138.307		5.071	.000
	PD BUDGET PER CAPITA	-78.695	20.290	-.180	-3.879	.000
	Total population	.006	.000	1.010	21.732	.000

a. Dependent Variable: number of incarcerated people

Figure 11: Pennsylvania indigent defense funding and incarceration with controls

Coefficients ^a						
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	black population	-1.589	4.804	-.013	-.331	.742
	latinx population	-42.813	15.321	-.141	-2.794	.007
	two or more races	658.922	151.218	.248	4.357	.000
	Median household price https://www.zillow.com/adams-county-pa/home-values/ and https://datausa.io/profile/geo/cameron-county-pa#housing (for cameron county)	-.001	.001	-.027	-.592	.556
	% cases dismissed http://www.pacourts.us/news-and-statistics/research-and-statistics/county-caseload-statistics	-29.429	19.656	-.066	-1.497	.140
	Total population	.005	.000	.928	17.011	.000

a. Dependent Variable: number of incarcerated people